THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOMBARDI'S CUCINA, INC., a Washington corporation, Plaintiff, v. HARLEYSVILLE INSURANCE COMPANY, a Pennsylvania corporation, Defendant.	Case No. C09-1620-JCC ORDER

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 18), Defendant's Response (Dkt. No. 26), and Plaintiff's Reply (Dkt. No. 36); Defendant's Motion for Summary Judgment (Dkt. No. 24), Plaintiff's Response (Dkt. No. 51), and Defendant's Reply (Dkt. No. 53); Defendant's Motion to Continue (Dkt. No. 27), Plaintiff's Response (Dkt. No. 32), and Defendant's Reply (Dkt. No. 37); and Plaintiff's Motion for Protective Order (Dkt. No. 39), Defendant's Response (Dkt. No. 45), and Plaintiff's Reply (Dkt. No. 47). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS IN PART Plaintiff's Motion for Partial Summary Judgment, GRANTS IN PART Defendant's Motion for Summary

Judgment, and STRIKES AS MOOT Defendant's Motion to Continue and Plaintiff's Motion for Protective Order for the reasons explained herein.

I. BACKGROUND

Flood insurance in the United States is provided through the National Flood Insurance Program (NFIP), a federal program administered by the Federal Emergency Management Agency (FEMA). In order to better administer the NFIP, FEMA authorizes private insurance companies—called Write-Your-Own (WYO) Carriers—to offer flood insurance policies under their own logos to the public. Although these policies are issued by private companies, the insurance contract itself—called a Standard Flood Insurance Policy (SFIP)—is written by FEMA; furthermore, the funds with which WYO carriers administer their policies are located in the U.S. Treasury. *Flick v. Liberty Mutual*, 205 F.3d 386, 389–93 (9th Cir. 2000).

Defendant sells flood insurance policies as a WYO carrier. (Mot. 2 (Dkt. No. 24).) Plaintiff, which operates an Italian restaurant, purchased flood insurance from Defendant for the property in which the restaurant is located for the period from November 13, 2008, to November 13, 2009. (First Am. and Supplemented Comp. ¶ 4.1 (Dkt. No. 23 at 2).) Plaintiff's insurance was of two types: Building Property and Personal Property. (Mot. 4 (Dkt. No. 18).) Generally speaking, Building Property coverage insures the building itself and any additions that have become a part of the building, while Personal Property coverage insures the contents of a building. (SFIP General Property Form III (Dkt. No. 15-2 at 50–52).) Plaintiff's landlord, KIN Issaquah Partnership (KIN), also held an SFIP on that property for Building Property coverage alone. (Mot. 2 (Dkt. No. 24).)

On or around January 7, 2009, the property leased by Plaintiff suffered damage due to a flood. (First Am. and Supplemented Comp. ¶ 4.17 (Dkt. No. 23 at 4); Mot. 5 (Dkt. No. 18).) From then through July 2009, Plaintiff and Defendant underwent the process of filing, adjusting, and paying the claims that arose out of the flood damage. Defendant paid three claims filed under Plaintiff's Personal Property coverage. Defendant refused, however, to pay

the claims Plaintiff filed under Building Property coverage seeking payment for damage suffered during the flood by leasehold improvements on Plaintiff's property. Payment on such claims was impermissible, Defendant argued, because a claim filed by KIN had already been paid and because multiple insurance policies on a single piece of property are prohibited by the terms of the SFIP. Plaintiff appealed that denial to FEMA, which, on August 11, 2009, responded to Plaintiff with a letter concurring with Harleysville's decision to deny the Building Property claims. Subsequently, on November 12, 2009, Plaintiff filed suit in this court to challenge Defendant's denial of the Building Property coverage. (Mot. 2–5 (Dkt. No. 24).)

In addition, by November 2009 Plaintiff sought to file a further Personal Property claim in addition to the three already paid by Defendant. (Resp. 4 (Dkt. No. 51).) Therefore, on November 25, 2009, about two weeks after Plaintiff's complaint was filed, Plaintiff requested that Defendant waive the requirement in the SFIP that an insured file a proof of loss within sixty days of the flood damage. (*Id.* at 5.) Defendant failed to respond to the request. (*Id.* at 6.) Consequently, Plaintiff filed an amended and supplemented complaint that further alleged Defendant had breached the parties' insurance contract by failing to pay a claim under Plaintiff's Personal Property coverage. (Dkt. No. 23.)

Plaintiff's instant motion for summary judgment concerns only the issues relating to Building Property coverage. Plaintiff seeks a declaration that its leasehold improvements are covered by the Building Property coverage of the SFIP and that payment on Building Property claims it has filed is not prohibited by either the clause of the SFIP prohibiting multiple policies or federal statutes limiting the total amount of flood insurance that may be issued on a single structure. Furthermore, Plaintiff requests that the Court order Defendant to pay Plaintiff's Building Property claim of $63,800. (Mot. 1 (Dkt. No. 18).) Defendant, in turn, seeks a continuance on Plaintiff's motion for summary judgment, arguing that the record currently before the Court is insufficient to decide the motion. (Mot. 1 (Dkt. No. 27).) Alternatively, Defendant argues that if the record is sufficient Plaintiff is entitled to neither

declaratory relief nor damages because Plaintiff failed to submit a timely proof of loss prior to filing suit. (Mot. 1 (Dkt. No. 24).)

Defendant's motion for summary judgment concerns Plaintiff's Personal Property claim. Defendant argues that because Plaintiff failed to timely file a proof of loss, Defendant had no obligations to make further payments under the contract. (Mot. 7 (Dkt. No. 24).) Plaintiff protests that its request for a waiver of the deadline to file a proof of loss was ignored, with no explanation ever provided, while Defendant insists that it lacks authority to grant or deny such requests. (*Id.* at 7–8).)

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) mandates that a motion for summary judgment be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). There exists a genuine issue as to a particular fact—and hence that fact "can be resolved only by a finder of fact" at trial—when "[it] may reasonably be resolved in favor of either party"; conversely, there exists no genuine issue when reasonable minds could not differ as to the import of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–52 (1986). Whether a particular fact is material, in turn, is determined by the substantive law of the case: "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. Summary judgment, then, demands an inquiry into "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law": if applying the relevant law to those facts about which no two reasonable factfinders could disagree dictates that the moving party must prevail, then a motion for summary judgment must be granted. *Id.* at 250–52.

III. DISCUSSION

A. Plaintiff's Business Property Coverage

1. Improvements

Plaintiff requests this Court to issue a declaration that a tenant's leasehold improvements are covered under the SFIP's Building Property Coverage. The SFIP defines "Improvements" as "Fixtures, alterations, installations, or additions comprising a part of the insured building." (SFIP General Property Form II.B.17 (Dkt. No. 15-2 at 49).) Article III.A, found under the "Coverage A-Building Property" section, provides, "We insure against direct physical loss by or from flood to: 1. The building described on the Declarations Page at the described location." (SFIP General Property Form III.A (Dkt. No. 15-2 at 50).) If improvements are part of the building, and if the building is covered under Building Property coverage, then it follows that improvements are covered under Building Property coverage. It appears that Defendant does not challenge this conclusion. (Dft's Resp. 1 (Dkt. No. 26).) Furthermore, Defendant explicitly concedes that tenants may possess an insurable interest in leasehold improvements and seems not to dispute that tenants may purchase Building Property coverage as long as their landlords do not hold a duplicate policy. (*Id.* at 1, 8–9.) Hence, the Court holds that, at least in general, the Building Property coverage of an SFIP covers tenants' leasehold improvements.

2. Multiple Policies

Article VII.U.1 of the SFIP provides that FEMA "will not insure your property under more than one NFIP policy." (SFIP General Property Form VII.U.1 (Dkt. No. 15-2 at 63).) Defendant contends that this provision prohibits different individuals from each holding flood insurance policies on a single piece of real estate; Plaintiff, by contrast, contends it merely prohibits a single entity from holding multiple policies on the same property interest. (Mot. 16 (Dkt. No. 18); Resp. 8 (Dkt. No. 26).) These two interpretations clearly turn on the ambiguity in the term "property." Because it is reasonable to read "property" to refer either to a piece of

real estate or to a property interest, the Court turns to the context of the sentence in order to determine which reading is more plausible.

Article VII.U continues by describing the procedures that arise when duplicate policies do exist on a single property. If the duplication was unknowingly created, the contract explains, the insured—referred to as "you"—may choose which policy to keep and may elect to increase the coverage limit on that policy to match the highest limit amongst the multiple policies held. (SFIP General Property Form VII.U.1 (Dkt. No. 15-2 at 63).) Were the clause designed for a situation where different entities held policies on the same piece of real estate, this method for ending the duplication would be nonsensical. Each insured's SFIP would create both the ability to cancel the policies of the other insureds and the incentive to do so. Further, the contract provides no guidance for how this mess might be resolved. Interpreting the contract to lead to such a result would be absurd. The Court interprets contracts to avoid absurd results. *See E-Z Loader Boat Trailers v. Travelers Indem. Co.*, 726 P.2d 439, 443 (Wash. 1986). Hence, Defendant's interpretation of VII.U as concerning multiple policyholders cannot stand; rather, VII.U must be read to address multiple policies held by the same individual on a single property interest. *Studio Frames, Ltd. v. Std. Fire Ins. Co.*, 483 F.3d 239, 248 (4th Cir. 2007). VII.U does not prohibit Plaintiff and KIN from simultaneously holding policies on the restaurant property to cover, respectively, the property itself and any leasehold improvements; therefore, Defendant may not rely on VII.U to deny Plaintiff's insurance claims under Building Property Coverage.

Defendant also claims that Article III.B.7 of the SFIP supports its preferred interpretation of VII.U. Article III.B.7 provides, "If you are a tenant, you may apply up to 10 percent of the Coverage B limit to improvements: a. Made a part of the building you occupy; and b. You acquired or made at your expense, even though you cannot legally remove them." (Standard Flood Insurance Policy General Property Form III.B.7 (Dkt. No. 15-2 at 52).) According to Defendant, by permitting tenants to apply part of their Personal Property

coverage to leasehold improvements the contract indicates that FEMA did not intend tenants to be able to purchase Building Property coverage for their leasehold improvements when the tenants' landlord held Building Property coverage on the property. This provision of the contract does no such thing. Rather, it merely indicates that FEMA intended tenants' improvements to be partially covered by Personal Property coverage. It is of course possible that FEMA might have so intended because it wished tenants to be prohibited from purchasing Building Property coverage under certain circumstances, but that purpose is certainly not explicit in the text of III.B.7, and FEMA might instead have had one of innumerably many other purposes for including that provision. If it wished to do so, FEMA had a very simple method of prohibiting tenants from purchasing Building Property coverage when their landlords had already done so: putting a provision in the contract. FEMA failed to do so, and this Court declines Defendant's invitation to read such a limitation into the contract when it simply is not there.

3. Cap on Total Coverage

Further, Defendant argues that it is prohibited by statute from paying all of Plaintiff's claims in this case. In relevant part, 42 U.S.C. § 4013(b)(4) provides:

> [I]n the case of any nonresidential property . . . for which the risk premium rate is determined in accordance with the provisions of section 4014 (a)(1) of this title, additional flood insurance in excess of the limits specified in subparagraphs (B) and (C) of paragraph (1) shall be made available to every insured upon renewal and every applicant for insurance, in respect to any single structure, up to a total amount . . . of $500,000 for each structure and $500,000 for any contents related to each structure[.]

42 U.S.C.A. § 4013(b)(4) (2010). Plaintiff argues that this provision limits how much flood insurance a single entity may place on a single structure; Defendant argues it should be read to limit the total amount of flood insurance that may be placed on a single structure. (Pl. Mot. 18 (Dkt. No. 18); Def. Resp. 12–13 (Dkt. No. 26).) Plaintiff is correct. *Studio Frames, Ltd.*, 483 F.3d at 250-252. The statute provides that the insurance therein described—the

"[A]dditional flood insurance in excess of the limits specified in subparagraphs (B) and (C) of paragraph (1) . . . in respect to any single structure, up to a total amount . . . of $500,000 for each structure . . . ."—will be made available "to every insured upon renewal and every applicant for insurance." Plaintiff is an insured. Hence, the statute authorizes Plaintiff to purchase flood insurance up to a total of $500,000 on any single structure. Congress knows how to limit the total amount of insurance on a single structure: 42 U.S.C. § 4013(b)(1), for example, provides that

> [A]ny flood insurance coverage based on chargeable premium rates under section 4015 of this title which are less than the estimated premium rates under section 4014(a)(1) of this title shall not exceed . . . (B) in the case of business properties which are owned or leased and operated by small business concerns, an aggregate liability with respect to any single structure, including any contents thereof related to premises of small business occupants (as that term is defined by the Director), which shall be equal to (i) $100,000 plus (ii) $100,000 multiplied by the number of such occupants and shall be allocated among such occupants (or among the occupant or occupants and the owner) under regulations prescribed by the Director; except that the aggregate liability for the structure itself may in no case exceed $100,000 . . . .

42 U.S.C.A. § 4013(b)(1). Congress chose to place "to every insured upon renewal and every applicant for insurance" in § 4013(b)(4). This Court will not read it out of the statute.

4. FEMA

Defendant notes in its briefing that FEMA, the agency responsible for administering the NFIP, concurs with Defendant's interpretation of the SFIP. As recounted above, the NFIP Director of Claims, James A. Sadler, rejected Plaintiff's appeal of Defendant's denial of Business Property coverage in a letter dated August 11, 2010, that explicitly endorsed Defendant's interpretations of the SFIP. (Dkt. No. 15-2 at 141–42.) Furthermore, in support of its no-duplicate-policies argument Defendant cites Section F of the General Rules found in the FEMA NFIP Flood Insurance Manual, which provides in relevant part, "Duplicate coverage is not permitted under the NFIP, so only one policy can be issued for building coverage . . . . The policy may be issued either in the name of the building owner or in the names of the building

owner and tenant." (Def. Resp. 10 (Dkt. No. 26).) Neither of these two administrative productions, however, are entitled to *Chevron* deference: "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citations omitted). Rather, "interpretations contained in formats such as opinion letters are 'entitled to respect,' but only to the extent that those interpretations have the 'power to persuade.' *Id.* (citations omitted). As explained above, the interpretations of the SFIP provided by FEMA lack that power. Therefore, the Court departs from FEMA's recommendations.

5. *Studio Frames*

In so holding, this Court concurs in the reasoning of a recent decision of the Fourth Circuit on nearly identical facts, *Studio Frames Ltd. v. Standard Fire Ins. Co.*, 483 F.3d 239 (4th Cir. 2007). Studio Frames, like the instant case, concerned a tenant—Studio Frames—that had purchased Building Property coverage from a WYO carrier—Standard Fire—for leasehold improvements and whose landlord had also purchased Building Property coverage under a different SFIP for the building itself. 483 F.3d at 241–42. After the property was flooded, Standard Fire denied Studio Frames' Building Property claims, arguing that tenants could not acquire Building Property coverage for leasehold improvements, that the SFIP prohibited tenants from holding Building Property coverage on a piece of real estate where the landlord also held such coverage, and that total amount of insurance permitted on a single structure was capped by statute at $500,000. In its ruling, the Fourth Circuit relied on considerations similar to those laid forth above in rejecting Standard Fire's arguments and ordering Standard Fire to pay the claims filed by Studio Frames. *Id.* at 244–250. That both this Court and the Fourth Circuit have reached the same conclusion on this issue helps accomplish the valuable aim of promoting nationwide consistency in the interpretation of a Federal contract employed across the country. In addition, as the *Studio Frames* court noted, the

interpretation of the SFIP reached in both cases is rendered further compelling by its consistency with the broader aims of the NFIP. *Id.*

6. Proof of Loss

Plaintiff concedes that it did not file a timely proof of loss on its Building Property claim before filing this suit and that the terms of the SFIP require the filing of such a proof of loss. (Pl. Reply 2 (Dkt. No. 36).) Defendant, therefore, argues that the instant suit must be dismissed. (Def. Mot. 1 (Dkt. No. 24).) Plaintiff, however, replies that it was excused from that requirement because Defendant had repudiated the contract by denying the Building Coverage claim. (Pl. Reply 2 (Dkt. No. 36).) Defendant does not dispute that repudiation of an SFIP may excuse the requirement that an insured file a proof of loss, but denies that it repudiated the contract in this case. (Def. Reply 1–2 (Dkt. No. 53).)

"Language that under a fair reading 'amounts to a statement of intention not to perform except on conditions which go beyond the contract' constitutes a repudiation." RESTATEMENT (SECOND) OF CONTRACTS § 250 cmt. b (1981) (citing comment 2 to Uniform Commercial Code § 2-610). Defendant concedes that it informed Plaintiff it would not pay Plaintiff's Building Property coverage claims because both Plaintiff and Plaintiff's landlord held Building Property coverage on the same piece of real estate. (Def. Reply 8 (Dkt. No. 53).) As a condition of performance, then, Defendant demanded that Plaintiff's landlord not hold Building Property coverage on the property at issue. This condition is not imposed by the SFIP. Defendant, therefore, did state its "intention not to perform except on conditions which go beyond the contract" and thereby repudiated the Building Property coverage under the SFIP. Hence, Plaintiff was excused from the requirement of filing a proof of loss. RESTATEMENT (SECOND) OF CONTRACTS § 255.

In response, Defendant argues that the denial of an insurance claim does not constitute repudiation of a contract. (Def. Reply 6–7 (Dkt. No. 53).) That argument, however, is irrelevant. Defendant did not merely deny a claim; rather, it refused to perform except on a

condition not found in the contract. The precedent Defendant cites to show that denying a claim is not repudiation, therefore, does not challenge this Court's present holding.

7. Damages

Finally, Plaintiff requests that this Court order Defendant to pay a Building Property claim of $63,800. The Court believes, however, that such action would be premature. There is no reason to believe that, the parties' obligations under the SFIP having been clarified, the standard process of insurance adjustment is inadequate for Plaintiff to secure payment. Since the Court lacks competence in insurance adjustment, it would constitute overreach to interfere in that process in the absence of a dispute requiring judicial intervention. Consequently, the Court denies Plaintiff's request that Defendant be ordered to pay the claim.

B. Plaintiff's Personal Property Coverage

1. Waiver

Plaintiff concedes that it failed to timely submit a proof of loss for $2,252.42 under the 10 Percent Improvements Coverage clause of the Building Property policy, and $44.980.01 in additional Personal Property Coverage. (Resp. 5 (Dkt. No. 51).) Here, repudiation is not an issue, but Plaintiff argues that this failure is excusable because it submitted to Defendant a request for a waiver of the 60-day filing deadline. (*Id.* at 5–6; Carr Decl. Ex. G (Dkt. No. 51).) Neither Defendant nor FEMA ever responded to the request for a waiver. (Resp. 6 (Dkt. No. 51).) By declining to answer instead of deciding the request on the merits, Plaintiff claims, Defendant and FEMA abused their discretion. (*Id.* at 6–7.) By failing to pay the claim, Plaintiff claims, Defendant breached the insurance contract. (Dkt. No. 23.) Plaintiff's arguments are mistaken.

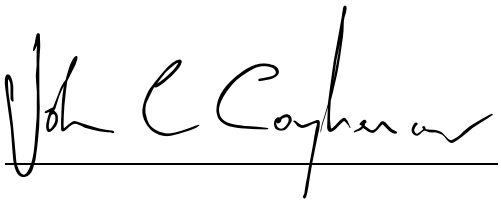
The Ninth Circuit has held that an insured may not avoid strict enforcement of the 60-day proof of loss requirement, except through a valid waiver from the Federal Insurance Administrator. *Flick*, 205 F.3d 386 at 391; 44 CFR 61.13(d). As Defendant points out, it has no authority to grant or deny a waiver of the proof of loss requirement. (Reply 9 (Dkt. No. 53).)

Plaintiff's sole authority for the proposition that this Court can review the denial of a waiver request is *Moffett v. Computer Sciences Corp.*, 647 F. Supp. 2d 517 (D. Md. 2009). In that case, however, FEMA itself was a Defendant—not merely the WYO carrier—and it was FEMA's actions that the court determined could be reviewed. Neither statute, regulation, nor case law provides support for a breach of contract claim against an insurer for failing to respond to a waiver request. It is troublesome that FEMA might choose to avoid review of its waiver determinations by failing to respond to requests, but this is an issue that Plaintiff should have pursued with FEMA. Accordingly, Defendant's motion is GRANTED IN PART.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment (Dkt. No. 18) is GRANTED IN PART and Defendant's Motion for Summary Judgment (Dkt. No. 24) is GRANTED IN PART. Consequently, the Court STRIKES AS MOOT Defendant's Motion to Continue (Dkt. No. 27) and Plaintiff's Motion for Protective Order (Dkt. No. 39).

DATED this 17th day of August, 2010.



John C. Coughenour
UNITED STATES DISTRICT JUDGE